Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	

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OFFICE OF THE SECRETARY

TO: The Commission

COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") hereby respectfully submits its comments on the "Notice of Proposed Rulemaking and Notice of Inquiry" ("NPRM/NOI") in the above-referenced proceeding.

I. Introduction

MPAA represents leading United States producers and distributors of motion pictures and television programming.[1] The

[1] These comments represent the positions of Buena Vista Pictures Distribution, Inc.; Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer, Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; and Universal Studios, Inc. on the matters addressed. Warner Bros., a division of Time Warner Entertainment Company,

programming produced by MPAA's members is exhibited through an array of video outlets, including television broadcast stations, cable television systems, and other multichannel video services.

MPAA has been a vigorous proponent of federal policies to enhance diversity of programming sources and to expand competitive outlets for programmers. The Cable Consumer Protection and Competition Act of 1992 ("1992 Act") contains numerous provisions to expand competition and diversity that are consistent with policies that MPAA has advocated.[2]

L.P., does not support the specific proposals set forth in these comments given the rapid expansion of channel capacity on the nation's cable systems, as well as the other provisions in the 1992 Cable Act and anticipated FCC rules that will address any issues of possible discriminatory behavior by cable operators.

[2] As MPAA explained to this Commission in its comments in MM Docket No. 92-265 ("Implementation of Sections 12 and 19..."):

> The diversity and vitality of video programming available to the American public through cable television and other multichannel video systems can only be maintained if the Commission fosters, through its regulatory policies, vigorous competition in an open marketplace among video program outlets. Moreover, as digital compression becomes a reality and the capacity of cable television and other video programming outlets increases, the availability of numerous and diverse sources of video programming will become even more important. Accordingly, the Commission's policies and rules should be formulated to encourage video programming vendors to produce and distribute the widest possible variety of video programming choices to the American public through cable and other multichannel operators.

Id. at 2-3.

We remain committed to the view, shared by the Commission, that "in the long term, competitive market forces will best promote the interests of viewers or consumers."[3] This perspective is also shared by the Congress, as reflected in the findings and goals of the 1992 Act.[4] We continue to support federal policies that "will, in the aggregate, best stimulate competition while not creating disincentives for cable operators to improve and invest in their systems and services."[5] The Commission has noted that some benefits may flow to the public and to the video programming industry from a certain degree of horizontal concentration and vertical integration in the cable industry and in other, competing multichannel video programming distribution businesses. The Commission's role is to balance these potential benefits and harms consistent with the Congressional directive.

Among the requirements of the 1992 Act that can help directly to promote program diversity are the expanded leased access provisions (section 9) and the provisions governing video programming carriage agreements (section 12). MPAA has commented at length in the implementation proceedings on both sections. The horizontal and vertical ownership limits and cross-ownership

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[3] Notice of Inquiry in MM Docket No. 89-600 (FCC 89-345), rel. Dec. 29, 1989, at para. 8.

[4] See Sections 2(a)(4)-(6) and 2(b) of the 1992 Act.

[5] Comments of MPAA in MM Docket No. 89-600 (March 1, 1990) at 4.

limitations under consideration in the instant proceeding are also premised, in whole or in part, on the need to preserve programming diversity.

In the main, we believe that the requirements of the 1992 Act that directly address the cable operator/video programmer relationship hold out great potential to promote program diversity. We believe that some of the additional safeguards under consideration in the instant proceeding would be complementary and necessary to that goal.

The positions we set forth below are specifically premised on prompt and effective Commission action to implement the requirements of sections 9 and 12 of the 1992 Act. We note that the Commission has 180 days from the date of enactment of the 1992 Act to implement new leased access rules and one year from the date of enactment to adopt new rules regulating carriage agreements. There is also a one-year deadline for prescribing new rules on horizontal concentration. We strongly urge the Commission to complete the proceedings in MM Dockets 92-265 and 92-266 prior to concluding the instant proceeding, and to keep the record open for additional comments on what level of horizontal or vertical restrictions is appropriate in light of the final rules adopted in the other two proceedings.

II. Subscriber Limits

MPAA has previously endorsed placing reasonable limits on the number of cable subscribers under the control of a single multiple system operator (MSO) as part of a series of measures that can help to promote diversity of program sources until effective competitive outlets emerge. As MPAA noted in an earlier proceeding:

> Concentration of power denies consumers the benefits of competitive pricing and of diverse programming. Concentration of power also denies those who produce programming the ability to obtain a fair market price for their products, and may even deny producers access to the market altogether... Horizontal concentration limits in broadcasting have proven essential to maintain diversity of ownership and programming. Limits on cable system concentration are all the more essential because of the real risk of foreclosure of programmers by a handful of cable operators.[6]

MPAA continues to support a reasonable cap on horizontal concentration. We believe that limiting the ownership or control of cable television systems by a single operator to not more than 25 percent of homes passed would be reasonable. Such a limit effectively caps the largest cable MSO at its current level of concentration.

We base our support for this proposed cap, which is more generous than we have advocated in the past, on several important premises. First, it assumes that the 1992 Act will have the intended effect of promoting effective competition among multichannel video programming distributors. Second, it assumes that the Commission adopts effective, workable regulations in MM

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[6] Comments of MPAA in MM Docket No. 89-600 at 22-23.

Dockets No. 92-265 (anti-coercion/anti-discrimination rules) and 92-266 (implementation of leased access regulations). Third, it assumes the adoption of reasonable attribution criteria, as discussed below. If these essential conditions are not met, we reserve the right to seek a lower cap.

In measuring "reach" for purposes of limiting horizontal concentration, the Commission's proposal to use "share of homes passed" rather than "share of cable subscribers" is not objectionable. Homes passed should be a relatively more stable measure. It also more accurately reflects the potential reach of a given cable operator, especially in those markets lacking competitive alternatives, and thus better suggests the capacity of the operator to foreclose programmers from such markets.

The Commission notes that the Senate Report instructs it to use the attribution criteria appearing in Section 73.3555 (Notes) of the Commission's rules to determine system ownership. We believe the Section 73.3555 rules have proven useful in the broadcasting context and should be adopted here absent a compelling showing that another measure would better balance concerns about the ability of one entity to influence or control the programming decisions of another against the desire to avoid chilling investments that would benefit consumers and programmers.

These limitations should be revisited as marketplace circumstances change. As competitive multichannel outlets to cable continue to grow, concern over the level of horizontal concentration in cable should be lessened. The Commission should commit

to review these rules in five years' time, but should also be open at any time to petitions for reconsideration of the rules that are based on a showing of significant changed circumstances or the failure of other remedies mandated by the 1992 Act.

III. Channel Occupancy Limits

In directing the Commission to "prescribe reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest,"[7] Congress seeks to address the possible foreclosure of non-cable-affiliated programmers from cable systems and favoritism by cable operators toward cable-affiliated programmers.

We propose that a cable operator should not be permitted to program more than 20 percent of its activated channels with program services in which it has an ownership interest, direct or indirect, of 15 percent or greater.[8] This simple and straightforward channel

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[7] 47 U.S.C. Sec. 533 (f)(1)(B).

[8] While our proposed measure of an "attributable interest" for purposes of the channel occupancy rule would differ from the attribution rule suggested for measuring horizontal concentration, we believe that the distinction is warranted by marketplace circumstances. It is common in cable programming for a large number of cable operators each to take a small stake in a programmer, thus spreading control more widely among operators and arguing for a relatively large attribution figure. It is more common in cable system ownership for one MSO (typically in a large MSO) to take a stake in the operations of control, including program selection decisions, which argues for a smaller attribution figure in the case of system ownership.

occupancy limit will help to reduce the risk that a cable MSO will favor program services in which it has a financial stake over those in which it does not. We believe an occupancy limit of this level would avoid chilling new programming investments by cable operators, while at the same time giving operators additional incentive to expand system channel capacity in order to raise the number of affiliated services they may carry.

By counting only program services in which a cable operator has a significant stake, the Commission could balance the desire to promote broad, and relatively modest, investment by MSOs in innovative start-up program services against the need to promote diversity of program sources, particularly non-cable-affiliated sources.

The channel occupancy percentage limit should be applied against the total number of activated channels on the system. Channels devoted to carriage of over-the-air signals or PEG access and leased access should not be deducted from the total against which the percentage cap is applied.

We would not oppose grandfathering of cable operators' current programming interests in order to minimize disruption of established industry arrangements, again provided that the Commission adopts workable and effective leased access and anti-coercion/anti-discrimination requirements as mandated by sections 9 and 12 of the 1992 Act, respectively.

The Commission inquires "what effect emerging technologies such as digital signal compression and fiber optic cable should

have on the channel occupancy limits." The Commission suggests that "expanded channel capacity will eliminate the need for channel occupancy limits..." and proposes to "establish a threshold beyond which the channel occupancy limits would no longer be applicable."[9] We believe such a determination would be premature.

While recent press accounts suggest that cable system capacities of 500 channels or more are within reach, it is not at all clear how these capacities will be used and what the implications are for non-cable-affiliated programmers. The effect could be to eliminate all incentives for cable operators to favor programming in which they have a financial stake. On the other hand, it is conceivable that literally hundreds of those channels could be used for non-video programming, or dedicated to "virtual video on demand" on which (e.g.) the same motion picture begins showing every five minutes on another channel (i.e., a single 120-minute movie could simultaneously occupy 24 channels), or otherwise allocated in ways that would promote diversity of programming sources minimally if at all.

The Commission need not judge today, with a complete absence of data or experience, how its channel caps should apply in some indeterminate future. Instead, as with its horizontal ownership limits, the Commission should either take a fresh look at its caps every five years or should entertain petitions to modify its caps based on significantly changed circumstances. Plainly, however, in

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[9] NPRM/NOI at para. 53.

today's world where 36-to-54-channel systems are the norm, the occupancy caps proposed herein are appropriate.

Finally, the Commission should not automatically eliminate the channel caps for cable systems in communities where effective competition has developed. If the competitive multichannel distributor is itself highly vertically integrated, removing channel caps from the cable system could result in foreclosure of non-affiliated programmers from either outlet. In any event, the emergence of effective competition (as measured by the 1992 Act) on a significant scale is many years off, and the Commission can reexamine this issue after a period of years or based on a petition showing significantly changed circumstances.

IV. Participation in Program Production

The Commission is directed by the 1992 Act to consider whether rules analogous to the Commission's financial interest and syndication rules (FISR) should be applied to multichannel video programming distributors. We reserve comment on such rules at this time. Our position on such rules in the future will be a function of what the Commission proposes for its new anti-coercion/anti-discrimination and leased access rules, and any complementary

restrictions on horizontal concentration or vertical integration, to promote diversity of programming sources.[10]

We reserve the right to file additional comments at a later date.

V. Conclusion

MPAA believes that adoption by the Commission of workable and effective new rules on anti-coercion/anti-discrimination and leased access holds out the best promise to promote diversity of programming sources. The horizontal and vertical restrictions addressed in the instant docket would be complementary to those new requirements.

The Commission should complete its work in MM Dockets No. 92-265 and 92-266 before concluding the instant proceeding. The Commission should then adopt new horizontal concentration and channel occupancy limits as recommended in these comments, but should keep the record in this proceeding open for additional comment subsequent to the completion of Dockets 92-265 and 92-266. The Commission should defer consideration of additional limits on

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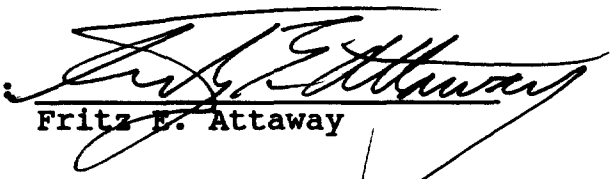
[10] It should be noted that the broadcast television networks currently subject to the FISR restrictions are not subject to leased access or anti-coercion/anti-discrimination requirements of the kind that will imminently apply to cable operators.

participation by cable operators or other multichannel video programming distributors in program production.

Respectfully submitted,

MOTION PICTURE ASSOCIATION
OF AMERICA, INC.

By: 
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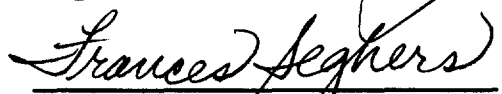

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